STATE OF MICHIGAN

COURT OF APPEALS

In re MARTINEZ/CRUZ, Minors.

UNPUBLISHED
April 2, 2020

No. 349400
Ottawa Circuit Court
Family Division
LC No. 16-082727-NA

Before: MARKEY, P.J., and GLEICHER and M. J. KELLY, JJ.

MARKEY, P.J. (*dissenting*).

Although I agree with the majority that the trial court plainly erred by failing to inform respondent that her plea could "later be used as evidence in a proceeding to terminate [her] parental rights," MCR 3.971(B)(4), I strongly disagree that the error affected respondent's substantial rights or seriously affected the fairness, integrity, or public reputation of the judicial proceedings, *In re Ferranti*, 504 Mich 1, 29; 934 NW2d 610 (2019). Accordingly, I dissent.

The Department of Health and Human Services (DHHS), following an investigation, may petition a court to take jurisdiction over a child. *In re Ferranti*, 504 Mich at 15, citing MCR 3.961(A). The petition must contain essential facts that if proven would permit the court to assume and exercise jurisdiction over the child. MCR 3.961(B)(3); MCL 712A.2(b); *In re Ferranti*, 504 Mich at 15. If a petition is authorized, the adjudication phase of the proceedings takes place, and the "question at adjudication is whether the court can exercise jurisdiction over the child (and the respondents-parents) under MCL 712A.2(b) so that it can enter dispositional orders, including an order terminating parental rights." *In re Ferranti*, 504 Mich at 15.

A court can take and exercise jurisdiction if a respondent "make[s] a plea of admission or of no contest to the original allegations in [a] petition." MCR 3.971(A); see also *In re Ferranti*, 504 Mich at 15. "The court shall not accept a plea of admission or of no contest without establishing support for a finding that one or more of the statutory grounds alleged in the petition are true, preferably by questioning the respondent unless the offer is to plead no contest." MCR 3.971(D)(2).

I note that until the Michigan Supreme Court decided *In re Ferranti*, a jurisdictional challenge such as the one respondent poses here would have been dismissed on appeal as an impermissible collateral attack on the adjudication determination because respondent did not

immediately appeal the jurisdictional ruling, and termination was not sought at the initial dispositional hearing. *In re Ferranti*, 504 Mich at 7-8, 18-19. Our Supreme Court explained:

> This Court's decision in *In re Hatcher*, 443 Mich 426; 505 NW2d 834 (1993), generally bars a parent from raising errors from the adjudicative phase of a child protective proceeding in the parent's appeal from an order terminating his or her parental rights. The *Hatcher* rule rests on the legal fiction that a child protective proceeding is two separate actions: the adjudication and the disposition. With that procedural (mis)understanding, we held that a posttermination appeal of a defect in the adjudicative phase is prohibited because it is a collateral attack. This foundational assumption was wrong; *Hatcher* was wrongly decided, and we overrule it. [*In re Ferranti*, 504 Mich at 7-8.]

Now, under similar procedural circumstances, the proper approach is not to dismiss the appeal but to examine the appellate challenge under the plain-error test. *Id*. at 29 ("adjudication errors raised after the trial court has terminated parental rights are reviewed for plain error"). Under plain-error review, a respondent is required to establish that "(1) error occurred; (2) the error was 'plain,' i.e., clear or obvious; and (3) the plain error affected . . . substantial rights." *Id*. Also, it must be shown that the error seriously affected the integrity, fairness, or public reputation of the child protective proceedings. *Id*. *In re Ferranti* has opened the door to jurisdictional challenges long after the adjudicative phase of the proceedings has passed, allowing a respondent to essentially agree to the exercise of jurisdiction by entering a plea, engage in proceedings for many months, participate in a termination hearing, and then raise a jurisdictional challenge that this Court must be address.

"Before accepting a plea of admission or plea of no contest, the court must advise the respondent on the record or in a writing . . . of the consequences of the plea, including that the plea can later be used as evidence in a proceeding to terminate parental rights if the respondent is a parent." MCR 3.971(B)(4). In this case, the trial court plainly erred by failing to inform respondent in a manner consistent with the requirements of MCR 3.971(B)(4). I cannot conclude, however, that respondent's substantial rights were affected or that the error seriously affected the integrity, fairness, or public reputation of the child protective proceedings.

First, in reviewing respondent's brief on appeal, I am struck by the complete absence of any claim that she would not have entered her no-contest plea had the court informed her of the consequences of her plea under MCR 3.971(B)(4). How can respondent be prejudiced if the court's failure to comply with MCR 3.971(B)(4) made no difference in her decision-making regarding a plea? Second, there is no indication that the trial court used respondent's no-contest plea against her when ruling to terminate her parental rights. Third, respondent engages in no analysis on the issues of prejudice and whether the plain error seriously affected the integrity, fairness, or public reputation of the child protective proceedings: She simply states in conclusory fashion that those elements were established "[f]or the same reasons expressed in *In re Ferranti*." See *Mudge v Macomb Co*, 458 Mich 87, 105; 580 NW2d 845 (1998) ("It is not enough for an appellant in his brief simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.") (quotation marks and citation omitted). Moreover, *In re Ferranti* is easily distinguishable because there the trial

court not only failed to inform the respondent of the consequences of the plea, the court also failed to inform the respondent of all the rights that were being waived, MCR 3.971(B)(3). Here, the trial court fully satisfied MCR 3.971(B)(3) regarding the waiver of rights; the court's only failure was that it did not tell respondent that the plea could be used against her at a termination hearing. Respondent entirely fails to explain why this distinction is irrelevant for purposes of applying *In re Ferranti* to her case.

Finally, this Court in *In re Pederson*, __ Mich App __, __; __ NW2d __ (2020); slip op at 10-13, essentially addressed the same error and circumstances as presented in the instant case and, relying on some of the reasons I set forth in the preceding paragraph, held that the respondents simply could not establish the requisite prejudice or that the plain error seriously affected the integrity, fairness, or public reputation of the judicial proceedings. The evidence in this case overwhelmingly established that respondent had an extensive history of severe drug and alcohol abuse, criminal activity, and participation in conduct that endangered the lives of her children. Also, she failed to secure housing appropriate for the children, failed to obtain reliable transportation, and began a relationship with a criminal sex offender. The trial court did not clearly err by finding that the statutory grounds were proven by clear and convincing evidence or by finding that there was a preponderance of evidence that termination was in the children's best interests. MCL 712A.19b(3) and (5); MCR 3.977(H)(3); *In re Beck*, 488 Mich 6, 10-11; 793 NW2d 562 (2010); *In re Moss,* 301 Mich App 76, 90; 836 NW2d 182 (2013); *In re Ellis*, 294 Mich App 30, 32; 817 NW2d 111 (2011).

I would affirm the trial court's order terminating respondent's parental rights. Accordingly, I respectfully dissent.

/s/ Jane E. Markey